

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FILED
APR 30 2008

CLERK

UNITED STATES OF AMERICA,

Plaintiff,

-VS-

JAMES ALLEN GREGG

Defendant.

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CR 04-30068

OPINION AND ORDER

Defendant was convicted of second degree murder and use of a firearm during a crime of violence. He was sentenced on September 30, 2005, to 135 months custody on the second degree murder count and 120 months custody for the firearms count, such sentences to be served consecutively, as required by law. Defendant appealed and the United States Court of Appeals for the Eighth Circuit affirmed his convictions and sentences on June 29, 2006. United States v. Gregg, 451 F.3d 930 (8th Cir. 2006).

Defendant filed a motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255. The basis of the motion is ineffective assistance of counsel in failing to seek to introduce evidence of specific instances of the victim's violent conduct pursuant to Fed. R. Evid. 404(b) for the purpose of showing the defendant's state of mind. I have conducted an initial consideration of the motion, as required by Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

The Eighth Circuit held in defendant's direct appeal that specific acts evidence "may be admissible under Rule 404(b) to prove a defendant's state of mind." United States v. Gregg, 451 F.3d at 935. While trial counsel did make an offer of proof as to defendant's subjective fear of the victim, trial counsel did not identify any specific instances of the victim's prior conduct which he sought to admit. The government had filed a motion in limine prior to trial seeking to exclude such evidence and at the hearing on the motion counsel for defendant specifically

advised the court that he did not intend to seek admission of specific instances. Defendant has set forth in his brief and papers in support of his motion to vacate that counsel was aware of specific instances of the victim's conduct showing his violent character.

Based upon the foregoing,

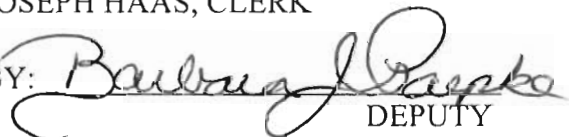
IT IS ORDERED that, pursuant to Rule 4 of the Rules Governing § 2255 Proceedings, the United States Attorney in and for the District of South Dakota shall serve and file an answer or responsive pleading, together with a legal brief or memorandum in support thereof, that complies with Rule 5 of the Rules Governing § 2255 Proceedings on or before June 15, 2008.

Dated this 30th day of April, 2008.

BY THE COURT:


CHARLES B. KORNMAN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
DEPUTY
(SEAL)